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Supreme Court, U.S.
FILED
OCT 2 2 2009
OFFICE OF THE CLERK

No. 09-55

IN THE

Supreme Court of the United States

STACY PLATONE, Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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Respondent does not address the central issue in this case: whether a publicly traded company can lawfully terminate an employee who uncovered a corporate fraud so long as the corporation itself was not a direct victim of the fraudulent scheme. Instead, Respondent curiously misreads the effect of the court of appeals ruling, and more importantly, this Court's proscription against affirming an administrative decision on alternate grounds. In addition, Respondent suggests there may be an issue of timeliness, while citing this Court's plain decision that resolved essentially the same question claimed to exist.

If allowed to stand, the decision will permit corporations to suppress and punish honest employees who report corporate crimes and will inevitably make law enforcement's investigation of those already challenging and difficult-to-prosecute offenses all the more formidable.

A. The Court Of Appeals Decision Violated The *Chenery* Doctrine And Affirmed An Unreasonable Interpretation Of The Sarbanes-Oxley Whistleblower Provision

Respondent does not address the *Chenery*[1] violation by the court of appeals, but instead argues that by deciding the case on alternate grounds, the court of appeals insulated the central issue from review. In so doing, Respondent refers to, but appears to misunderstand, a central tenet of Supreme Court review, that the Court reviews judgments, not opinions. It should be clear that Petitioner seeks review of the court of appeals judgment that upheld the Labor Department's final decision and the creation of the *Platone* Rule as the rationale for its decision. That the court of appeals chose not to review the Department's basis for its decision does nothing to lessen the appropriateness of review by this Court.[2] Remarkably, without

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[1] *SEC v Chenery*, 332 U.S. 194 (1947).

[2] Respondent chooses to defend the court of appeals alternate grounds for affirming the Department, that the entire case turned on a "billing discrepancy," but does not address the lack of record support for the court's conclusion. Indeed, the Department itself noted in its final decision that "While [Platone] expressed her belief that the pilots were cheating the company out of money, the real victim of any alleged

mentioning *Chenery*, the Department appears to suggest that the Court impliedly overruled the Doctrine in *Smith v. Phillips*, 455 U.S. 209 (1982), a case not involving review of an administrative decision but of federal habeas ruling. Likewise, the other case cited by Respondent, *Rutan v. Republican Party*, 497 U.S. 62 (1990), did not involve review of an administrative decision but related to allegations of First Amendment violations in Illinois state personnel actions.

Finally, Respondent does not address two compelling reasons for granting the petition, that the court of appeals decision lets stand an unreasonable interpretation of the Sarbanes-Oxley Act that denies protection to employees who report ongoing corporate fraud and that this important issue is likely to recur with some frequency.

Rather, Respondent focuses its brief on disputing the division among lower courts on the meaning of the statute. In particular, Respondent mischaracterizes the First and Seventh Circuit decisions set forth in the petition, and it suggests there is no case law in accord with the Department's narrow interpretation of the Act's whistleblower protection.

In truth, the *Platone* Rule stands as a refuge for corporations seeking to conceal criminal activity and the court of appeals judgment allowing the

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impropriety was ALPA (the Air Line Pilots Association)." Pet. App. 43a. It is also important that the ALJ's findings of fact made it clear that the billing discrepancy was purposeful and that Platone's employer was complicit in the scheme. Pet. App. 94a, 99a.

Department's decision to stand is worthy of review by this Court.

B. The Petition For A Writ Of Certiorari Was Timely Filed

The Respondent acknowledges that the Court's decision in *Young v. United States*, 535 U.S. 43 (2002), plainly held that the principle of equitable tolling is firmly rooted in bankruptcy law. "It is hornbook law that limitations periods are 'customarily subject to equitable tolling,' unless tolling would be 'inconsistent with the text of the relevant statute.' Congress must be presumed to draft limitations periods in light of this background principle. That is doubly true when it is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and 'appl[y] the principles and rules of equity jurisprudence.'" 535 U.S. at 49-50. (Citations omitted). Respondent states that, when *Young* was decided, "the lower courts were *somewhat* divided over whether Section 108(c) contains a tolling provision," but apparently concedes that in *Young*, the Court found it unnecessary to resolve that question in light of its decision regarding equitable tolling. Most significantly, Respondent concedes that, if *Young* applies with equal force in this case, the "petition would be timely." Opp. 15. (Emphasis added).

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

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OCTOBER 2009